SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No. 82-1854

BOAZ AVITZUR,

Petitioner,

v.

SUSAN ROE AVITZUR,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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September 1983

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Respondent mistakenly asserts that the Court does not have jurisdiction over this matter pursuant to 28 U.S.C. § 1257(3) because the order of the New York Court of Appeals is not a final judgment. However, respondent's purely technical argument ignores this Court's "pragmatic

approach" to determinations of finality within the meaning of § 1257 -- an approach which supports to review here. Shaffer v. Heitner, 433 U.S. 186, 195-96, n.12. (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

This Court will review orders of a state's highest court which are "plainly final on the federal issue and ... not subject to further review in the state courts" in cases where, as here, "there should be no trial at all" if the order is held erroneous. Cox Broadcasting Corp. v. Cohn, 420 U.S. at 485. Accordingly, in Cox, the Court held that it had the power, before trial on the merits, to decide whether a newspaper could even be sued for publishing the name of a rape victim. Similarly, in Shaffer, the Court reviewed the

constitutionality of quasi in rem jurisdiction, presented before trial on the merits.

Like Shaffer and Cox, this case presents a threshold constitutional question which goes to the right of the state court to entertain a claim at all. Petitioner contends that the First Amendment bars the New York courts from even considering the religious dispute between the parties. The constitutional harm is in the very adjudication of respondent's claim. Thus, though "the federal issue would be mooted if the petitioner ... prevailed on [nonfederal grounds] ... in the later state-court proceedings, ... there is nevertheless sufficient justification for immediate review of the federal question finally

determined in the state courts." Cox Broadcasting Corp. v. Cohn, 420 U.S. at 478-79.1/

None of the cases cited by Respondent comes within the "categories in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion ... of additional proceedings anticipated in the lower courts." Cox, 420 U.S. at 477. This Court declined review in Flynt v. Ohio, 451 U.S. 619 (1981) and San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) because additional federal questions remained to be determined on remand. 451 U.S. at 622; 450 U.S. at 633. In Costarelli v. Massachusetts, 421 U.S. 193 (1975); appellant had not sought review of the federal issue in the highest court of the state. In Minnick v. California Department of Corrections, 452 U.S. 105 (1981), an affirmative action case which came to the Court not long after its decision in University of California Regents v. Bakke, 438 U.S. 265 (1978), certiorari was dismissed "because of significant developments in the law ... and ... significant ambiguities in the record." 452 U.S. at 127. New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978) (White, J., in chambers) is completely inapposite; it involves an application for a stay before the filing of a petition for certiorari.

Moreover, if petitioner were to prevail on remand and make "unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision" of the New York Court of Appeals that the state courts may compel obedience to religious law and authority. Cox Broadcasting Corp. v. Cohn, 420 U.S. at 485. Whatever the result in this Court on the merits, "it would be intolerable to leave unanswered, under these circumstances, an important question ... under the First Amendment." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247 n. 6 (1974), Cox Broadcasting Corp. v. Cohn, 420 U.S. at 485-486.

The need for immediate review here is especially compelling in light of the fact that, since the petition for

certiorari was filed herein, New York has enacted a statute which requires litigants to prove that no religious bar to remarriage exists before a final judgment of civil divorce can be entered. Laws of 1983, Ch. 979. (A copy of the statute is submitted herewith as Appendix A.) The Governor's Memorandum approving the law, submitted herewith as Appendix B, makes clear that it was enacted to permit the state courts to force Jewish husbands "to give the wife ... a 'get'," purportedly solving "a problem created by the interrelation of Jewish law and New York Civil Law." (B2). The Governor candidly acknowledged constitutional objections to the law, but, noting the absence of a "single, clear, impelling precedent," nevertheless approved the bill and explicitly defered the constitu-

tional question to the courts. (B3-4) Although the constitutionality of the statute is not before the Court here, the Court can and should settle the constitutional question now. The maxim that "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,'" Cox Broadcasting Corp. v. Cohn, 420 U.S. at 477-478, quoting Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945), applies not only to the dispute between the Avitzurs but to countless other New York litigants who

will be affected by the new statute. The Court should grant certiorari.

New York, New York
September 7, 1983

RESPECTFULLY SUBMITTED,

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APPENDIX A

Laws of the State of New York, 1983,
Ch. 979, Assembly Bill No. 6423-B

STATE OF NEW YORK

6423--B

1983-1984 Regular Session

IN ASSEMBLY

March 24, 1983

Introduced by M. of A. SILVER, M. H. MILLER - Multi-Sponsored by -- M. of A. BIANCHI, BRODSKY, DUGAN FELDMAN, FRIEDMAN, GOLDSTEIN, GOTTFRIED, GRIFFITH, HEVESI, HIKIND, JACOBS, LASHER, LIPSCHUTZ, MAYERSOHN, NADLER, NEWBURGER, SALAND, SANDERS, SIEGEL, STRAINERE, VITALIANO, WALDON, WEINSTEIN, YEVOLI -- read once and referred to the Committee on Judiciary -- amended on the special order of third reading, ordered reprinted as amended, retaining its place on the special order of third reading -- again amended on third reading, ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the domestic relations law, in relation to preventing parties to a marriage solemnized by a clergyman or minister which is concluded by annulment or divorce from establishing or maintaining barriers to remarriage

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The domestic relations law is amended by adding a new section two hundred fifty-three to read as follows:

§ 253. Removal of barriers to remarraige. 1. This section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in subdivision one of section eleven of this chapter.

2. Any party to a marriage defined in subdivision one of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint, that he or she has taken or will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce.

3. No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a verified statement that he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce.

4. In any action for divorce based on subdivisions five and six of section one hundred seventy of this chapter in which the defendant enters a general appearance and does not contest the requested relief, no final judgment of annulment or divorce shall be entered

unless both parties shall have filed and served verified statements that each has taken all steps solely within his or her power to remove all barriers to the other party's remarriage following the annulment or divorce.

5. As used in the verified statements prescribed by this section "barrier to remarriage" includes any religious or conscientious restraint or inhibition imposed on a party to a marriage, under the principles of the denomination of the clergyman or minister who has solemized the marriage, by reason of the other party's commission or withholding of any voluntary act. It shall not be deemed a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses. "All steps solely within his or her power" shall not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination.

6. No final judgment of annulment or divorce shall be entered, notwithstanding the filing of the plaintiff's verified statement prescribed by this section, if the clergyman or minister who has soleminized the marriage certifies, in a verified statement, that he or she

has solemnized the marriage and that, to his or her knowledge, the plaintiff has failed to take all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce, provided that the said clergyman or minister is alive and available to testify at the time when final judgment would be entered.

7. Any person who knowingly submits a false verified statement under this section shall be guilty of making an apparently sworn false statement in the first degree and shall be punished in accordance with section 210.40 of the penal law.

§ 2. This act shall take effect immediately.

APPENDIX B

Memorandum of the Governor of New York
filed with Assembly Bill No. 6423-B B1

TO THE LEGISLATURE:

MEMORANDUM filed with Assembly Bill Number 6423-B, entitled:

"AN ACT to amend the domestic relations law, in relation to preventing parties to a marriage solemnized by a clergyman or minister which is concluded by annulment or divorce from establishing or maintaining barriers to re-marriage"

CHAPTER 979
APPROVAL # 90

A P P R O V E D

The bill amends the Domestic Relations Law by adding a new section 253 to provide that any party to a marriage pending a divorce or annulment must allege in a verified complaint that the party has taken or will take prior to the entry of final judgment all steps to remove any barrier to the defendant's

remarriage following the annulment or divorce. The bill prohibits the entry of any annulment or judgment of divorce unless the plaintiff has filed such a statement.

The bill solves a problem created by the interrelation of Jewish law and New York Civil Law. Traditional Jewish law does not regard a secular divorce as sufficient to dissolve a marriage. It requires that the husband give the wife a document referred to as a "get".

This bill was overwhelmingly adopted by the State Legislature because it deals with a tragically unfair condition that is almost universally acknowledged.

The requirement of a get is used by unscrupulous spouses who avail themselves of our civil courts and simultaneously use their denial of a get vindictively or as a form of economic coercion.

Concedely, this use of our civil courts unfairly imposes upon one spouse, usually the wife, enormous anguish.

Some have urged that despite this, the bill before me should not be approved because it may be declared unconstitutional. There have been submitted to me arguments on both sides of the constitutional question but there is no single, clear, impelling precedent. If there were, I would defer to it.

Given the clarity of the need, the efficiency of this statutory solution and the uncertainty of the constitutional objection, I approve the measure.

If there is a constitutional impediment, I am sure our excellent courts will make that clear in due time.

The bill is approved.